

FA6QGRAs

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA

5 v.

06 CR 150 (JSR)
Sentence

6 JUSTIN GRAUER

7 Defendant

8 -----x

9 New York, N.Y.
10 October 6, 2015
11 4:20 p.m.

12 Before:

13 HON. JED S. RAKOFF

District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

18 JANE KIM

Assistant United States Attorney

19 FOX ROTHSCHILD LLP

20 Attorney for Defendant Grauer

21 ROBERT W. RAY

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1 (In open court; case called)

2 THE DEPUTY CLERK: Will the parties please identify
3 themselves for the record.

4 MS. KIM: Good afternoon, your Honor. Jane Kim for
5 the government.

6 THE COURT: Good afternoon.

7 MR. RAY: Good afternoon, your Honor. Robert W. Ray
8 Fox Rothschild LLP on appointment of the Criminal Justice Act.
9 I am present here with my client, Justin Grauer.

10 THE COURT: Good afternoon. We are here for possible
11 resentencing. The parties are agreed that the new offense
12 level would be 29. The Criminal History Category is IV. The
13 new guideline range would, therefore, be 151 to 188 months,
14 which, of course, would, if a guideline sentence were given, be
15 a very substantial reduction.

16 The government has opposed resentencing or reduction
17 because of Mr. Grauer's disciplinary history in prison, which
18 is somewhat extensive. And that is why I wanted Mr. Grauer
19 here to hear his own side of that story. I will not consider,
20 however, in any way, shape or form the incident of
21 February 2014 which was expunged; and although there is some
22 authority that says I could consider it, I don't think it is
23 really under the circumstances appropriate or fair to consider
24 it, so I won't.

25 Almost all the other incidents are basically fist

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1 fights. And it seems clear that Mr. Grauer has a penchant
2 forgetting into fist fights. He has kept his nose clean, so to
3 speak, for the last few years in that regard, but it's not just
4 one incident or two. It's several incidents. So I have some
5 concerns about that. Of course, there are a lot of other
6 factors that both sides have mentioned: The fact that the
7 Court's original sentence was a considerable reduction from
8 what the sentence might have been and so forth, but I will
9 really focus today on whether Mr. Grauer's behavior in prison
10 is sufficiently egregious as to preclude any significant
11 reduction.

12 Let me hear first from defense counsel, then
13 government counsel, then from Mr. Grauer if he wishes to be
14 heard.

15 MR. RAY: Yes, your Honor. If I could just provide
16 context about what I hope to be the exercise of the Court's
17 discretion within that new range. I will say this: First,
18 there is one other prior disciplinary issue that I did want to
19 address before I get to the issue of fights and assaults. It
20 is referenced by the government in its September 22 letter on
21 the second page at the top. It is also contained within
22 Exhibit D to that letter. This is the issue about possession
23 of a narcotic or related paraphernalia not prescribed for the
24 defendant by medical staff.

25 I think a review of the records will indicate, and my

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1 client's own statements are consistent with that, and that is,
2 that he was prescribed medication at a particular point in time
3 which included these antianxiety and antidepressant
4 medications. They were for the purpose of being consumed at
5 the time they were prescribed. He retained them, so he's
6 guilty of a disciplinary infraction by hanging on to medication
7 that should have been consumed. He kept it in an Aleve bottle.
8 But I did not want the Court to be left with the notion that
9 what this was about was his attempt to smuggle in narcotics
10 into the institution. They were prescribed to him.

11 THE COURT: Yes, the government may know more about
12 this, but at least from the little I know, these two substances
13 are not narcotics in the normal sense. These are essentially
14 medications. Now some medications can have a narcotic effect,
15 but this is not like heroin or cocaine or something of that
16 nature.

17 MR. RAY: So not to make excuses, he does accept
18 responsibility for the fact that what he did was unauthorized,
19 but I didn't want the record to be left to wonder or your Honor
20 to wonder whether or not this was truly a smuggling operation
21 of some kind or if it was an effort to bring narcotics from
22 outside of the institution into the institution. He was
23 originally prescribed this medication, and in that sense what
24 he did was hang on to it, which he shouldn't have done.

25 THE COURT: All right.

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1 MR. RAY: Now, with regard, I think, to the principal
2 issue that I think your Honor would like us to address, and
3 that is the question of the fights and assaults in prison, I
4 want to be careful here, but I do think there is some context
5 that is useful; not to excuse a disciplinary report, which I
6 think I would characterize as far from model. Understand, your
7 Honor, this is somewhat of an unusual case. Where we're
8 talking about Mr. Grauer who has served come February ten years
9 of a 235 month sentence, so we're talking about a long period
10 of time in a maximum security institution.

11 THE COURT: Yes, that is all true, but remember that
12 in his original sentencing, even though the guideline range
13 stipulated in his plea agreement was 188 to 235 months,
14 probation had recommended no less than 360 months based on his
15 very extensive criminal history, which is what put him up in
16 Category VI. So, looked at from that angle, there was a
17 neutral party, the probation office, recommending that he do 30
18 years.

19 MR. RAY: True. But I will say with regard to that --
20 and I wasn't there; your Honor did the sentencing -- I believe
21 that what drove your Honor's query at sentencing as to why the
22 government took a plea under the terms it did related to what
23 amounted to essentially charge bargaining over quantity. I
24 think that is what actually pushed it into a land that would
25 otherwise, according to the probation office, have resulted in

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1 an otherwise higher sentence.

2 I'm not here to argue about that. I wasn't there.
3 Your Honor made the decision that you made. There is no point
4 in revisiting that, but I did want the record to reflect at
5 least my understanding of why we landed in the range that we
6 landed in when Mr. Grauer was originally sentenced.

7 Also, with regard to his prior criminal record at the
8 time of the original sentencing, it does reflect a background
9 and a penchant, as your Honor said, even at that point in his
10 life with regard to assaults and fights. But my review of that
11 record is that those were convictions under New York State law,
12 all of which were misdemeanors.

13 With regard to his record, not to minimize it, while
14 in the institution, I think your Honor has already noted that
15 within at least the approximately last three years he has
16 stayed out of trouble. The fights and assaults without getting
17 into who started it -- and what I think my experience has shown
18 not just the record in this case but in many other cases -- in
19 maximum security institutions, there are measures that inmates
20 take in a preemptive way to otherwise to protect themselves.
21 It's not to excuse the conduct but it happens.

22 The second thing to say about it is that now I believe
23 this record correctly reflects with regard to his disciplinary
24 conduct the absence of any contraband in the institution, no
25 weapons of any kind; and while it does reflect assaults and

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1 fights, no one in that context was seriously injured. I don't
2 mean to minimize it, but I just think that context is
3 important. Mr. Grauer can speak to the specifics. I know your
4 Honor, I'm sure, has questions, but I at least wanted that
5 context to be presented here.

6 THE COURT: Very good. Let me hear from the
7 government.

8 MS. KIM: Yes, your Honor. Two very brief points at
9 the outset. In terms of the July 15, 2010 incident, the
10 government agrees with defense counsel's recitation of the
11 facts.

12 In terms of the February 12, 2014 incident and the
13 government's September 22 submission, the government would just
14 like to clarify that we came into possession of these reports
15 after the last appearance, so we just wanted to make sure that
16 the Court and defense counsel had all of that --

17 THE COURT: And it was very conscientious of you to
18 provide that to me.

19 MS. KIM: Yes, thank you.

20 One other thing, the government just wanted to
21 recognize that we believe the defendant's family is also in the
22 courtroom. So we appreciate that they are here, and the
23 government rests substantially on our submission, but we just
24 want to make one main point and that is reiterated in our
25 submission; that is, that from approximately 2004 to 2012 for

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1 nearly a decade, regardless of whether or not the defendant was
2 in prison or out of prison, the defendant committed
3 approximately one violent or assaultive act each year. If the
4 defendant had had perhaps one or two violent or assaultive
5 incidents while in prison, we think that would have been a
6 different story. But here the record reflects that he has 13
7 disciplinary incidents --

8 THE COURT: Let me ask you this. Were any of those --
9 certainly none in prison involved weapons. Were any of the
10 ones before prison involving weapons?

11 MS. KIM: I don't believe that they did involve
12 weapons, your Honor.

13 THE COURT: So, I mean, in thinking about it -- and
14 this is not to excuse it, but getting into fist fights and
15 things of that sort seems to me of a different order. When
16 you're using a weapon, you are either intending to or you, at
17 least, run the very high risk of doing permanent damage to the
18 other person. Now, that can happen in a fistfight, but it's
19 much less likely. So I think there is something to the
20 notion -- I'm not, if at all, though convinced by defense
21 counsel's argument that this is necessarily a way of protecting
22 himself.

23 I want to hear from Mr. Grauer, but it is more
24 consistent with when angry, he resorts to his fists. We don't
25 condone that. We don't excuse it. But it's not the same thing

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1 as picking up a gun or a knife or something like that.

2 MS. KIM: Yes, your Honor, it's not the same thing as
3 picking up a firearm, but we would say that it still arises to
4 violent conduct and that the repeated instances are what
5 concerns the government.

6 THE COURT: OK. Very good.

7 Let me hear from Mr. Grauer.

8 MR. RAY: Your Honor, I was just remiss, if I might
9 say to your Honor and so the record reflects, my client's
10 parents both of them are here, including the defendant's father
11 Mr. Grauer, Ken Grauer who submitted a letter to I believe the
12 probation office which I think your Honor has, and he suffers
13 from ALS, but nevertheless made the trip into court at my
14 request this afternoon.

15 THE COURT: Well, you know, I'm very delighted that
16 these folks are here. I always have, to be frank, mixed
17 reactions when a fine family like this is present. On the one
18 hand is the fact that it shows so much positive about them in
19 that they still love and want to be of assistance in any way
20 possible to the defendant, and that is a lovely thing, and it
21 reflects that there is good in him too or they wouldn't have
22 those kinds of feelings.

23 On the other hand, they, of course, are among the
24 victims of his crime because by committing crimes that led to
25 his imprisonment, he took himself away from them in ways that

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1 clearly have caused them anguish. So it is a mixed sword, but,
2 in any event, I'm very happy they're here.

3 MR. RAY: The family members present include his
4 grandparents, his uncle, his aunt, so a number of people.
5 Obviously, they are most aware of how long this has been, how
6 long a sentence this is, and how much time he's already served
7 but I just wanted to be sure your Honor was aware.

8 THE COURT: Mr. Grauer.

9 THE DEFENDANT: Your Honor, I first want to say I
10 appreciate you allowing me the opportunity to come here and
11 speak for myself and present some issues directly as a man to
12 man. And in light of the infractions I caught while in BOP, I
13 want to say I a hundred percent take full responsibility for
14 every infraction I caught. And even though, you know,
15 hindsight is 20/20, and looking back I feel like honestly I
16 could have made better decisions and handled things in a much
17 more mature way, much better, more educated way, I guess. But
18 every day of my life is like a process of evolution, so I say
19 this to say in the first part of my incarceration, I was still
20 immature, and I was still going through a lot of growth and
21 development. And, unfortunately, I didn't grow as fast as I
22 should have grown, and I probably could have handled each
23 situation differently.

24 THE COURT: Well, there must be situations now that
25 you face where other inmates are either giving you a hard time

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1 or threatening you or you have substantial disagreements with
2 them where in the past you would fight them, why are you not
3 doing that now?

4 THE DEFENDANT: Well, like I was saying, I've grown a
5 lot in the last couple years. I've been through a lot of
6 experiences where, you know, experience is the best teacher, so
7 something I might have been more quick to fly off the handle
8 with a couple years ago, I'm more passive. I look past it and
9 say, you know, it's not worth it. I've learned through going
10 through trials and tribulations. Not only that, but I'm trying
11 to do the right thing. I'm taking things into consideration.
12 I'm in a maximum security prison where not everybody around me
13 wants to change. You know what I mean?

14 THE COURT: I understand that it's not populated
15 entirely by Mother Teresas, yes.

16 THE DEFENDANT: So when you're an individual or a
17 certain part of a group of individuals that do want to change,
18 you're kind of looked at like you're ostracized because you're
19 not one of the bad guys or at least you're not trying to be one
20 of the bad guys any more. So when you're trying to change and
21 the majority doesn't care about changing because they're never
22 going home or they're not going home for 20, 30 years, you're
23 kind of looked at as a Mr. Softy, so they try to take advantage
24 of you or they try to push your buttons and see if they could
25 get over on you because a lot of people prey on the weak, so

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1 they see your lack of hostility as a weakness. So sometimes
2 I'm in certain situations where I have to stand up for myself
3 and defend myself so I'm not victimized in the future.

4 THE COURT: How are you handling that now?

5 THE DEFENDANT: So far, so good. The last three years
6 I haven't had no physical disputes or anything.

7 THE COURT: I understand that, but there must have
8 been -- I understand exactly the psychology you are talking
9 about that some of the other inmates have, so you must still be
10 being placed in situations where they're baiting you, where
11 they're trying to get you to retaliate. And when you don't,
12 what do they do then?

13 THE DEFENDANT: Well, my tolerance is -- I have a
14 higher tolerance now. I just walk away or I, you know, I don't
15 let words -- I used to let words bother me, words and, you
16 know, of course, physical -- physical contact bothered me. I
17 used to let more words bother me, and I would feed into it.
18 Now I turn the other cheek, so to speak. I let things role off
19 my shoulder more now because I believe I'm getting older.
20 That's what I personally believe; I'm in the process of
21 evolution.

22 THE COURT: How old are you now?

23 THE DEFENDANT: I'm 35. When I started, I was 25, 24.

24 THE COURT: Well, there's a lot of studies that
25 suggest that actually people do change psychologically in the

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1 way you indicate around the mid-thirties, so congratulations;
2 you met the test.

3 THE DEFENDANT: Thank you.

4 THE COURT: I was going to go through each of these
5 incidents, but I think giving further thought to it, that would
6 not necessarily be productive. It was very important to me
7 though to hear from you personally, so I'm very happy you're
8 here.

9 Is there anything else anyone wanted to raise for the
10 Court at this time?

11 MS. KIM: Not from the government, your Honor.

12 MR. RAY: Your Honor, I would ask in conclusion that
13 you do exercise your discretion to sentence within the range.
14 I have made the point that if it would be logical to conclude
15 consistent with the way your Honor approached this from the
16 original sentencing, that giving the defendant the benefit as
17 he is eligible for -- understanding that it's discretionary
18 with the Court -- to that reduced range, would put him in the
19 new range, and that your Honor would sentence him to the top of
20 that range just as you did in the original sentencing.

21 THE COURT: Mr. Grauer may not know this, but Mr. Ray
22 is in my view one of the finest attorneys that practice in this
23 court. I said this publicly on many occasions. One of the
24 reasons is he doesn't ask for something absurd. He reads the
25 judge's mind and he knows what is possible. And I thought,

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1 Mr. Ray, this was a very good example. There is no way I would
2 have considered giving him like the bottom of the range, but
3 the top of the new range seems to me to be a reasonable
4 request.

5 MR. RAY: Finally, I would just say, so your Honor
6 knows context, because it took me a while to do the math, and
7 even though it's somewhat difficult to figure out how much BOP
8 gives for good time served and how in this particular instance
9 given the disciplinary record -- which may be wiser for me not
10 to mention, but I need to mention it -- it's not clear how much
11 credit he'll get, but he will get some.

12 When I did the math, just so your Honor knows the
13 math, he served, come February, ten years. If you figure if it
14 were at the bottom of the range of 151 and you cranked into the
15 equation what credit he would likely receive as a result of
16 having now served that amount of time, 151 would actually
17 probably put Mr. Grauer close to time served come the beginning
18 or so of next year. What we're talking about, the remaining
19 amount of time even at the higher end, it probably what amounts
20 to a three year sentence or so remaining to be served. I
21 wanted your Honor to understand kind of where we are now in
22 October of 2015.

23 THE COURT: All right.

24 MR. RAY: That's it. Thank you.

25 THE COURT: Thanks very much.

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1 THE DEFENDANT: I appreciate that, your Honor. Thank
2 you.

3 THE COURT: Mr. Grauer is, of course, saddled with his
4 past. The past cannot be erased. The past is a very sad and
5 disturbing one. Just from our discussions here and my
6 recollection of the case earlier, it's clear that Mr. Grauer is
7 an intelligent person who could have done a lot better for
8 himself. But he is still a young man, and I think there is
9 every indication that he is moving in a direction that warrants
10 some consideration, so I am going to grant him the reduction to
11 the top of the new guideline range.

12 So, the sentence of the Court is that he is sentenced
13 to 188 months in prison to be followed by supervised release on
14 the same terms and conditions as previously set. I can't
15 remember whether those conditions included anger management as
16 a special condition; but if not, we will add one now. So he
17 will, upon his release, be given anger management help as the
18 probation office determines it is appropriate.

19 Before I advise the defendant of his right to appeal,
20 is there anything else either counsel wishes to raise with the
21 Court anything from the government

22 MS. KIM: No, your Honor.

23 THE COURT: Anything from the defense?

24 MR. RAY: No, your Honor.

25 THE COURT: Mr. Grauer, you have the right to appeal

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1 this sentence. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: If you can't afford counsel for any
4 appeal, the Court will appoint one for you free of charge. Do
5 you understand that?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Good luck to you.

8 THE DEFENDANT: Thank you.

9 MS. KIM: Thank you, your Honor.

10 (Adjourned)